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No. 58072-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEMAR RHOME,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Demar Rhome challenges his conviction of first degree murder arguing first he was not competent to stand trial. Mr. Rhome argues further he was denied a fair trial by the trial court's refusal to strike improperly admitted evidence. Mr. Rhome argues he was also denied a fair trial and his right to control his defense by the court permitting the state to present in its case-in-chief evidence rebutting a diminished capacity defense which Mr. Rhome never raised. Finally, Mr. Rhome contends his appearance in shackles at trial denied him due process.

B. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Rhome of his right to due process by failing to find him incompetent.

2. Because it is unsupported by the record, the court must strike the finding of fact that Mr. Rhome "is able to effectively assist counsel in the defense of his case."

3. The trial court erred in refusing to strike improperly admitted evidence.

4. The trial court erred and deprived Mr. Rhome of his Sixth Amendment right to present a defense by allowing the state to

present expert testimony rebutting a diminished capacity defense which was never raised.

5. The trial court erred in admitting other acts evidence.

6. Mr. Rhome's appearance at trial in shackles deprived him of due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment prohibits convicting an incompetent defendant. A criminal defendant is incompetent where he cannot reasonably assist in their own defense. Where the evidence established Mr. Rhome could not assist in his own defense does his conviction violate the Fourteenth Amendment?

2. Other acts evidence which is admitted solely for its propensity value denies a defendant due process. A trial court is generally required to grant a timely motion to strike improperly admitted evidence. Where the trial court found the State improperly elicited prior acts evidence, and Mr. Rhome requested the court instruct the jury to disregard the improper evidence, did the trial court err and deprive Mr. Rhome a fair trial by refusing to instruct the jury to disregard the evidence?

3. The Sixth Amendment to the United States Constitution allows a defendant to determine his defense. Where Mr. Rhome did not raise a diminished capacity defense, did the trial court err in allowing the State, in its case-in-chief, to present expert testimony that Mr. Rhome had the capacity to commit the offense?

4. Before admitting other acts evidence under ER 404 a trial court must determine by a preponderance of the evidence that the act occurred. Did the trial court err in refusing to make such a finding prior to allowing the prior acts testimony?

5. A defendant may only be shackled where the trial court identifies evidence on the record that the defendant poses an imminent risk of escape or harm to others in the courtroom, or has demonstrated an inability to behave properly. Here in the absence of any showing of danger or escape risk, the trial court refused to require jail officials to deviate from their standard policy. Did the trial court err?

D. STATEMENT OF CASE

In November 2003, Kialani Brown stayed with Mr. Rhome and sixteen year-old Lashonda Flynn at the home they shared in Seattle. 3/6/06 RP 116. A few days after her arrival, Ms. Brown repeatedly stabbed Ms. Flynn killing her. 3/7/06 RP 43-45.

Ms. Brown told police, however, Mr. Rhome had killed Ms. Flynn, and in exchange for her agreement to testify to such, the State allowed her to plead guilty to first degree manslaughter. 3/7/06 RP 57-58. Mr. Rhome was charged with first degree murder. CP 37-39.

Prior to trial the court conducted a hearing at which it determined Mr. Rhome was competent to stand trial. 6/8/06 RP. The trial court subsequently allowed Mr. Rhome to waive his right to an attorney and proceed pro se at trial. 8/30/05 RP 12.

On the eve of trial Ms. Flynn changed her story and finally admitted she alone had stabbed Ms. Flynn. Ms. Brown, however, testified she had committed the murder at the direction of Mr. Rhome. 3/7/06 RP 41. Ms. Brown changed her guilty plea, pleading guilty to second degree murder. 3/7/06 RP 60.

A jury convicted Mr. Rhome as charged. CP 63.

E. ARGUMENT

1. THE TRIAL COURT ERRED AND DEPRIVED MR. RHOME OF DUE PROCESS BY FINDING HIM COMPETENT TO STAND TRIAL

a. The Due Process Clause does not permit conviction of an incompetent defendant. The Due Process Clause of the Fourteenth Amendment prohibits the conviction of a person who is not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L. Ed. 2d 815 (1966). A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

This standard is embodied in RCW 10.77.050, which provides "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050; In re the Personal Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001).

A trial court has a degree of discretion in determining an individual's competency. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). However,

> [a] lawyer's opinion as to his client's competency and ability to assist in his own defense is a factor to which the trial court must give considerable weight in determining a defendants competency to stand trial.

State v. Hicks, 41 Wn.App. 303, 307, 704 P.2d 1206 (1985).

The trial court in the present case did not give proper weight to the opinion of Mr. Rhome's attorneys and concluded Mr. Rhome was competent despite the great weight of evidence to the contrary.

b. The trial court's conclusion as to Mr. Rhome's competency is contrary to the record. Mr. Rhome's attorney's questioned his competency not on the question of his ability to understand the charges, but rather his inability to rationally assist his attorneys. 6/8/05 RP 4-5. Dr. David White testified that based on his evaluation of relevant material, Mr. Rhome could not rationally assist his attorneys and was thus incompetent.

Dr. White testified that he reviewed numerous prior mental health evaluations of Mr. Rhome, and that each of those prior evaluations made an Axis I diagnosis.[1] 6/8/05 RP 57. Dr. White

[1] "Axis I" refers to classification and analytical procedure set forth in *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)* which

concluded Mr. Rhome had "psychotic disorder not otherwise specified," and noted that prior evaluations consistently reached a similar diagnosis. 6/8/05 RP 23. Dr. White noted that not only had staff at Western State Hospital (WSH) previously reached a similar diagnosis, they had relied upon that diagnosis to conclude Mr. Rhome was incompetent to stand trial in a prior case. Id. at. 24. Dr. White noted that among all the mental health evaluations of Mr. Rhome, beginning at age 14, the evaluation prepared by Dr. Jason Dunham at WSH in the present case stood alone in failing to make an Axis I diagnosis of Mr. Rhome.[2] 6/8/05 RP 25.

Dr. Dunham opined Mr. Rhome was not suffering from a major mental illness, but merely an extreme personality disorder. 6/8/05 RP 84, 87. Dr. Dunham concluded there was no mental

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provides a five-tiered classification as follows: *Axis I:* clinical disorders, including major mental disorders, as well as developmental and learning disorders; Axis II: underlying pervasive or personality conditions, as well as mental retardation; Axis III: medical conditions which may be relevant to the understanding and treatment of the mental disorder; Axis IV: psychosocial and environmental factors contributing to the disorder; and Axis V: Global Assessment Functioning.

[2] In fact, after the court found Mr. Rhome competent he was returned to WSH for an evaluation regarding a potential diminished capacity defense. That evaluator again concluded an Axis I diagnosis might be made stating "there's some data that suggests major mental illness also." 3/7/06 RP 131; See also Supp CP __, Sub 262 (A copy of the evaluation was marked as Exhibit 35 and Dr. Ward testified to its contents. While the exhibit was never admitted a copy was apparently filed). Dr. Ward's report made and Axis I diagnosis based on Mr. Rhome's history.

illness that rendered Mr. Rhome incompetent. Id. at 84-87. Dr. Dunham opined that Dr. White's "diagnosis was wrong." Id. at 112.

Dr. Dunham offered that Mr. Rhome's actions were purposeful and suggested he may being trying avoid prosecution. 6/8/05 RP 82. Dr. White testified that rather than malingering, Mr. Rhome was adamant in his belief as to his competency and his desire to go to trial.[3] 6/8/06 RP 35.

Walter Peale, Mr. Rhome's attorney, stated Mr. Rhome "does not appreciate what is happening to him and how I can be of benefit to him." 6/8/05 RP 132. Mr. Peale explained that based upon his years of experience, Mr. Rhome's was not merely a general dissatisfaction with a particular attorney or public defenders generally, but rather "based upon, as best I can tell very unrealistic interpretations of what I'm telling him and what's occurring." Id. at 133. Mr. Peale was uniquely positioned to offer insight as to Mr. Rhome's ability to work with counsel, as he had previously represented Mr. Rhome in an case in which WSH concluded Mr. Rhome was incompetent to stand trial. Id. at 132.

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[3] Dr. Ward, of WSH, noted in his diminished capacity evaluation that Mr. Rhome's persistent denial of mental illness may in fact suggest a major mental disorder. Supp CP __, Sub 262

The court's formulaic written findings of fact, such as they are, do not mention any of the evidence presented other than the WSH report much less resolve the obvious factual disputes or give any insight to the weight the court afforded the opinion of Mr. Rhome's attorney. Supp. CP __, Sub No. 164. The introductory portion of the court's written findings provides "the state, the defendant, and defense counsel all speaking in favor of determination of competency," Id., a plainly incorrect statement in light of the lengthy hearing on competency. In short, the court's written findings do not meaningfully encapsulate the evidence presented nor the court's ruling, and are in most respects useless.

The court's oral ruling is similarly silent with respect to Mr. Peale's opinion as to Mr. Rhome's ability to assist in his defense. See 6/8/05 RP 144-49. Thus, rather than give "considerable weight" to Mr. Peale's opinion, the court appears to have ignored it all together.

In Ortiz the Court concluded the competency determination was adequately supported where the record established "the petitioner understands that there is a judge in the courtroom, that a prosecutor will try to convict him of a criminal charge, and that he has a lawyer who will try to help him." 104 Wn.2d at 482-83. Here,

the record established Mr. Rhome understood the first two of these points, and Dr. White opined Mr. Rhome understood the charges against him. 6/8/05 RP 16. However, Dr. White opined, and Mr. Rhome's actions in court bear out, that Mr. Rhome did not understand his attorneys were there to help him. In fact, Dr. White's evaluation revealed Mr. Rhome believed his attorneys were working with the prosecutor and "trying to conspire against him." 6/8/05 RP 32. Mr. Peale's own observations were consistent with this. 6/8/05 RP 133. Dr. Dunham described Mr. Rhome as "cooperative" and "easily . . . redirected," (6/8/05 RP 77) an observation which flies in the face of the trial record. Yet even Dr. Dunham, while steadfastly disagreeing with any Axis I diagnosis, allowed that Mr. Rhome's personality disorder would make it "extraordinarily difficult" for his attorney's to work with him. 6/8/05 RP 89.

The trial court, nonetheless elected to place greater weight on Dr. Dunham's evaluation because, the court concluded, Dr. Dunham had access to better information. 6/8/06 RP 148. Even ignoring Dr. White's assessment of Mr. Rhome's ability to work with his attorneys, and focusing instead on Dr. Dunham's concession of the difficulty of working with Mr. Rhome, together

with the "considerable weight" the court should have but failed to afford Mr. Peale's opinion, the evidence more than established Mr. Rhome's incompetence. Mr. Rhome did not understand his attorneys were there to assist him, nor did he possess the ability to rationally assist them in his defense. The trial court's finding that Mr. Rhome was competent is contrary to the evidence. The resulting conviction denied Mr. Rhome due process.

2. THE TRIAL COURT ERRED AND DEPRIVED MR. RHOME OF A FAIR TRIAL IN FAILING TO INSTRUCT THE JURY TO DISREGARD IMPROPERLY ELICITED BAD ACTS EVIDENCE

a. After the State elicited improper testimony the court failed to instruct the jury to disregard the evidence. The first question asked of Seattle Police Detective Rolf Norton in redirect by the deputy prosecutor was:

> What did [Mr. Rhome's former girlfriend] give you in conversation with her, tell you anything the defendant had done to her that may have explained her anger towards him?

3/1/06 RP 85. The detective answered that the former girlfriend alleged Mr. Rhome "had choked her, hit her with a frying pan, and raped her." Id. at 86. The detective added the further allegation that Mr. Rhome had tried to make her work as a prostitute. Id.

After initially permitting the questioning, the trial court shortly thereafter questioned the deputy prosecutor as to why the evidence was relevant. 3/1/06 RP 90. The deputy prosecutor acknowledged he had brought the allegations to the court's attention prior to his questioning, and acknowledged the trial court probably would have ruled against their admission, a point with which the trial court agreed. 3/1/06 RP 92.

Despite the apparent intent of his question to elicit some damning allegation, the deputy prosecutor maintained he had not expected the rape allegation. 3/1/06 RP 91. The deputy prosecutor was apparently aware of the allegation as he then said "I didn't talk to the Detective before to suggest we don't go into other things." Id. Thus, the prosecutor knew of the allegations, asked an open-ended question which could only be reasonably understood as soliciting that information, and then maintained it was unexpected. Again, this is an experienced prosecutor, and any claim of mistake is simply not credible.

Mr. Rhome requested the court instruct the jury to disregard the testimony. 3/1/06 RP 100. The court refused, concluding it would compound the prejudice to revisit the testimony in instructing the jury to disregard it. Id.

Instead, the trial court accepted the deputy prosecutor's suggestion of further questioning Detective Norton to elicit the fact that no charges were filed regarding any of the former girlfriend's allegations. 3/1/06 RP 102-04. Detective Norton, when asked whether charges were filed, testified "not to my knowledge." 3/1/06 RP 106.

b. The trial court found and the State properly conceded the evidence of the alleged prior acts was not admissible. The trial court concluded that had the State sought a pretrial ruling on the prior acts evidence the court would have found the evidence inadmissible. 3/1/06 RP 92. The deputy prosecutor acknowledged that would have been the likely result. Id. Indeed, the evidence was not admissible under ER 404(b).

Generally, to admit evidence of other wrongs, the trial court must:

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). This

analysis must occur on the record. State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002). In doubtful cases, the evidence should be excluded. Thang, 145 Wn.2d at 642 (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

There was not evidence to establish the allegations by a preponderance of the evidence. The State never identified the purpose for admission nor the relevance of that purpose to the elements of the charged offense. Additionally, the probative value of the evidence, if any, did not outweigh its prejudice.

Hearsay statements are generally inadmissible. ER 802. Hearsay is defined as an out-of-court statement which is offered for the truth of the matter asserted. ER 801(c). The allegations of Mr. Rhome's former girlfriend, who never testified, plainly fall within this definition. Because there does not appear to be any exception in ER 803 permitting admission of such statements, they were not proper under ER 802.

Thus, the trial court's conclusion that the evidence was not admissible was correct.

c. The trial court had a duty to cure the erroneous admission of the evidence. The admission of other acts evidence which is probative only of a defendant's propensity or criminal

character, deprives a defendant of a fair trial and violates the Due Process clause of the Fourteenth Amendment to the United States Constitution. McKinney v. Rees, 993 F.2d 1378, 1386 (9th Cir.), cert. denied sub nom., Olivarez v. McKinney, 510 U.S. 1020 (1993). By failing to instruct the jury to disregard the evidence, or provide any instruction on its use, the trial court left the jury to use it as propensity evidence, and thereby deprived him of a fair trial.

Where improper evidence is presented before the jury, the generally accepted remedy is to instruct the jury to disregard it. See K. Tegland, 5 Washington Practice, Evidence Law and Practice, §103.8. But here, despite Mr. Rhome's request for such an instruction the trial court refused, concluding it would just draw the jury's attention to the improper testimony. 3/1/06 RP 100. Instead the court arrived at a "remedy" which allowed the state to revisit the testimony, and simply ask the detective if any charges were filed. This questioning led only to the ambiguous answer "not to my knowledge," and thus left open the possibility that charges had been filed. Moreover, this supposed remedy never told the jury to disregard the evidence or even to limit its consideration to some proper purpose. The jury was free to conclude that indeed the allegations were true and that Mr. Rhome had simply "gotten away

with" rape and assault. Thus, rather than cure the impropriety, the trial court's remedy at best did nothing and at worst compounded the prejudice.

The trial court's failure to remedy the prejudice or to limit the evidence's use as propensity evidence deprived Mr. Rhome of a fair trial.

d. The failure to instruct the jury to disregard the propensity evidence was not harmless. Because the failure to strike the evidence permitted the jury to consider the evidence solely for its propensity value, the error violated Mr. Rhome's due process rights. McKinney, 993 F.2d at 1386. As such, the State must prove the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Here, no restriction was placed on the jury's consideration of the improperly admitted evidence. The prejudice was compounded by the supposed remedy which allowed the jury to conclude Mr. Rhome had gone unpunished for the alleged rape and assault. The State cannot establish that the error was harmless.

Even if the court were to conclude the propensity use of the evidence did not rise to a constitutional violation, the error was

nonetheless prejudicial. Evidentiary errors require reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991); State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Again, the jury's unfettered ability to consider the evidence for whatever purpose together with the added information that it remained uncharged had a very real likelihood of affecting the outcome of trial. Thus, the error requires reversal.

3. THE TRIAL COURT DEPRIVED MR. RHOME OF DUE PROCESS AND HIS RIGHT TO PRESENT A DEFENSE BY ALLOWING THE STATE TO REBUT A DIMINISHED CAPACITY DEFENSE THAT MR. RHOME NEVER RAISED

a. The rights to a fair trial and to independently decide what defense to present are bedrock principles underlying a fair trial. The state and federal constitutions guarantee an accused person the right to present a defense, including the right to independently choose what defense to present, as long as it is relevant and not unreasonable. Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1997); Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). When rules abridge a defendant's right to present a defense, they must

not be arbitrary or contrary to the purposes of the constitutional guarantees. Rock, 483 U.S. at 56.

Central to a fair trial is the exclusion of prejudicial and inflammatory information. State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997); see ER 403 (rule requiring evidence be more relevant than prejudicial); ER 404(b) (rule barring uncharged misconduct absent specific grounds for relevance based on facts of case). Generally speaking, impeachment material or evidence contesting a defense is not relevant and is thus inadmissible until the witness has been impeached or the defense has been introduced. Bourgeois, 133 Wn.2d at 400-01 (citing "settled" legal rules stated in authorities such as 1 McCormick on Evidence, 47, at 142 (4th ed. 1992) and United States v. Holmes, 26 F. Cas. 349, 352 (C.C. Me. 1858)). A narrow exception lets the prosecution introduce evidence relevant for impeachment purposes before its witness is impeached based on the inevitability of such impeachment. State v. Petrich, 101 Wn.2d 566, 574-75, 683 P.2d 173 (1984) (relying on United States v. Arroyo-Angulo, 580 F.2d 1137, 1146-47 (2nd Cir.), cert. denied, 439 U.S. 913 (1978)). While the premature introduction of impeachment material "patently runs afoul of well established rules of evidence" it is not reversible error

when not objected to and the undeniable focus of the defense from the inception of the trial. Arroyo-Angulo, 580 F.2d at 1146-47.

Similarly, it is error, but not necessarily reversible error, to admit evidence designed to rebut a defense before that defense has been introduced when the defense is inevitable and central to the case. See Bourgeois, 133 Wn.2d at 401. For example, in United States v. Hearst, 563 F.2d 1331, 1338 (9th Cir. 1977), the defense announced before trial that its "only defense" would be duress. The Ninth Circuit decided that even if it was erroneous to admit evidence designed to rebut the defense in the government's case-in-chief, the error was harmless in light of the unambiguous defense claim that it would present no other defense to the charge. Id. at 1338.

In the present case, the State offered evidence rebutting a diminished capacity defense which was never raised by Mr. Rhome. This error denied Mr. Rhome a fair trial and demands reversal of his conviction.

b. The court's premature admission of uncharged criminal conduct denied Mr. Rhome control over his defense. As the State's case-in-chief drew to a close, the State presented the testimony of Dr. Barry Ward of WSH, that based upon his

evaluation of Mr. Rhome, Mr. Rhome had the capacity to form the requisite intent for the offense. At the time it presented Dr. Ward's testimony, the State knew Mr. Rhome had not endorsed any witness to testify he lacked the capacity to commit the crime. The State was additionally aware that the only evidence, other than his own testimony, that Mr. Rhome could possibly offer were the previous evaluations finding Mr. Rhome incompetent. As an experienced trial attorney, the deputy prosecutor knew such evidence was irrelevant, or at worst insufficient, to make out a diminished capacity defense. This knowledge is borne out by the state's motion in limine immediately prior to Mr. Rhome's testimony, to bar admission of these reports. The State's knowledge of the absence of evidence supporting such a defense is further illustrated by the fact that the State, not Mr. Rhome, urged the court to instruct the jury on diminished capacity. 3/9/06 RP 2. The prosecutor explained he was doing so in spite of the complete absence of any evidence offered by Mr. Rhome to support it. One might surmise the basis for the request was not the prosecutor's magnanimity but rather their recognition that Dr. Ward's testimony was wholly irrelevant unless the jury was instructed on the defense.

Even if Mr. Rhome had made comments to the court that he hoped to present a diminished capacity defense, he never did. In any event he could not be constitutionally barred from altering his theory of defense. Rock, 483 U.S. at 55; State v. Johnson, 90 Wn.App. 54, 66, 950 P.2d 981 (1998); CrR 4.7(b)(2)(xiii; xiv) (defendant may be required to disclose insanity defense or general nature of defense); CrR 4.7(h)(7)(i; ii) (court may impose sanctions for failing to comply with discovery rules).

A diminished capacity defense was not inevitable in the case at bar, and in fact the State knew it was unlikely to be properly made at all. Nor was it the only available defense. See Hearst, 563 F.2d at 1338 (defense agreed its duress defense would be only defense possible). The preemptive admission of Dr. Ward's testimony improperly allowed the State to dictate the defense Mr. Rhome would present to the jury and denied Mr. Rhome a fair trial.

4. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT PRIOR-ACTS EVIDENCE

a. The State sought admission of testimony by Kialani Brown alleging Mr. Rhome had previously raped her. After having presented the allegations of Mr. Rhome's former girlfriend without first seeking a ruling by the court, the deputy prosecutor

sought a ruling outside the presence of the jury on the admission of testimony by Ms. Brown that Mr. Rhome raped her in the days preceding her murdering Ms. Flynn. 3/6/06 RP 13-14. The State contended the evidence was relevant to "explain the context in which she felt compelled to do what she did at the request of the Defendant." Id. at 14. The State did not address the provisions of ER 404.

Mr. Rhome objected arguing the allegations were not true and didn't "pertain" to the murder charges. Id. at 15-16.

The trial court allowed the evidence, concluding "whether or not it happened . . . is somewhat a different issue than whether the State would be allowed to bring it out on direct examination." Id. at 18. The court concluded the evidence was relevant to explain and illustrate the State's theory that Ms. Brown committed the murder under Mr. Rhome's control. Id. at 18-19.

Ms. Brown testified that at some point in the days leading up to her murder of Ms. Flynn, Mr. Rhome raped her. 3/6/06 RP 125.

b. Absent proof that a prior act occurred it is not admissible. A foundational requirement for the admission of other acts evidence is a determination by a preponderance of the evidence that the event occurred. Thang, 145 Wn.2d at 642. Here

the court expressly refused to make such a finding stating instead, "whether or not it happened . . . is somewhat a different issue than whether the State would be allowed to bring it out on direct examination." 3/6/06 at 18. Absent such a finding, the court erred in admitting the evidence.

c. The admission of Ms. Brown's testimony was not harmless. The court's erroneous admission of Ms. Brown's testimony had a very real likelihood of affecting the outcome of the trial. Ms. Brown admitted she alone stabbed Ms. Flynn. 3/7/06 RP 43-45. She claimed however, that she did so only because Mr. Rhome had in the five days they had been together, apparently gained sufficient control of her to cause her to commit such a heinous crime. Absent the erroneous admission of her allegations of rape, her claim is even less supportable. Thus, the erroneous admission of his evidence had a reasonable likelihood of affecting the outcome of the trial, and is not harmless. Ray, 116 Wn.2d 531. This is even more egregious when coupled with the court's failure to strike the allegations of rape made by Mr. Rhome's former girlfriend. Thus, reversal is required.

5. THE TRIAL COURT DEPRIVED MR. RHOME OF DUE PROCESS BY REFUSING TO EXERCISE ANY DISCRETION IN REQUIRING HIM TO APPEAR AT TRIAL IN RESTRAINTS

a. Mr. Rhome was shackled during trial. During jury selection, the deputy prosecutor noted Mr. Rhome was wearing a leg restraint under his pants, and was not certain whether the restraint was visible to prospective jurors. 2/27/06 RP 16. Mr. Rhome requested the court order the jail to remove the restraint as he had no intention of going anywhere. Id. The court did not make a record of whether or to what degree the restraint was visible. Rather the court concluded "its not going to occur to the jurors that that has anything to do with his custody status." Id. at 17.

b. Criminal defendants have the right to appear before the jury unfettered, unless "impelling necessity" demands otherwise. A defendant has a right to appear at trial free of shackles and restraints except for extraordinary circumstances. Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922. This ensures the defendant receives a fair and impartial trial as provided for in the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§3

and 22 of the Washington Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed. 525 (1986); Finch, 137 Wn.2d at 842. The right to be free of shackles applies equally to visits to the crime scene. State v. Williams, 18 Wash. 47, 49-50, 50 P. 580 (1897).

Finch noted shackling infringes on numerous rights of the defendant, including the right to a presumption of innocence. 137 Wn.2d at 844. Shackling creates a substantial danger of erasing this presumption. Id. (citing *inter alia* Allen, 397 U.S. at 344). Shackling also tends to prejudice jurors against a defendant. Finch, 137 Wn.2d at 845 (citing Estelle v. Williams, 425 U.S. at 503). The danger is particularly acute where the defendant is charged with a violent crime, as the jury will likely conclude shackling indicates the defendant's violent nature and predisposition to commit violent crimes. Finch, 137 Wn.2d at 845 (citing People v. Duran, 16 Cal 3d 283, 290, 545 P.2d 1322 (1976)).

Because of these dangers "close judicial scrutiny" is required before a defendant may be ordered to appear in shackles. Estelle v. Williams, 425 U.S. at 504. A trial judge must exercise discretion based on facts in the record. State v Hartzog, 96 Wn.2d 383, 400, 635 P.2d 684 (1981). "A broad general policy of imposing physical

restraints upon prison inmates charged with new offenses because they may be 'potentially dangerous' is a failure to exercise discretion. Id.

Therefore, shackling of a defendant is only permissible where evidence in the record indicates: (1) "the defendant poses an imminent risk of escape;" (2) "the defendant intends to injure someone in the courtroom;" or (3) "the defendant cannot behave in an orderly manner." Finch, 137 Wn.2d at 850. Moreover, a trial court errs where it bases its decision solely on "the judgment of correctional officers who believe[] that using restraints during trial is necessary." Id. at 853.

A trial court must make a record of the necessity for security measures against a particular defendant. Hartzog, 96 Wn.2d at 400-01.

c. The trial court abused its discretion in allowing Mr. Rhome to be shackled. The court failed to make a record of the degree to which the jurors may have been able to observe the restraint. Rather, the court simply speculated that the jurors would not know what the restraint was. Mr. Rhome argued he was only required to wear the restraint because of the King County Jail's classification of him and that the court had the authority to order the

restraint removed, the court responded "I know what I have control of and what I don't . . . I don't see any reason why he can't wear that." But Finch and Hartzog require more, they require actual facts in the record to support the court's reasoning and conclusions.

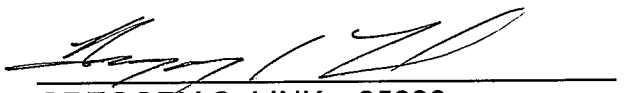
Finch makes clear that the trial court and not corrections officers must make the decision of whether a defendant is or is not shackled. 137 Wn.2d at 853. Moreover, that decision must be made from evidence in the record that the defendant poses a risk of flight or to courtroom security. There was no such record or finding here. At a minimum the court should have taken steps to ensure that what was apparently visible to the prosecutor was not visible to jurors.

d. This Court must reverse Mr. Rhome's conviction. Because this error impacts constitutional rights, the State must prove the error was harmless beyond a reasonable doubt. Chapman, 386 U.S. 18. In light of the court's failure to make an adequate record, the State cannot prove that Mr. Rhome's appearance in restraints did not deprive him of fair trial.

F. CONCLUSION

For the reasons above, this Court should reverse Mr. Rhome's conviction.

Respectfully submitted this 13th day of March, 2007.



GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DEMAR RHOME, Appellant.	)	NO. 58072-8-I

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 13TH DAY OF MARCH, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DEMAR RHOME 838720 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVENUE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MARCH, 2007.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711